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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 123

CARTER CARBURETOR CORPORATION, *Petitioner*,

v.

LAWRENCE C. KINGSLAND, *Commissioner of Patents*, *Respondent*.

PETITION OF CARTER CARBURETOR CORPORATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

SUBJECT INDEX.

	Page
Petition for Writ of Certiorari	1
Summary and Short Statement of the Matter Involved	2
Jurisdiction	8
Questions Presented	9
Reasons Relied on for Allowance of the Writ	10
Brief in Support of Petition	13
Statement	13
Specification of Errors	13
Summary of Argument	13
Argument	14
Point 1.—The United States Court of Appeals for the District of Columbia has decided questions of substance relating to the construction of R.S. § 481 (35 USC § 6) and its application to and effect upon R.S. § 483 (35 USC §6) and the regulations made thereunder. Thereby, and by its judgment founded thereon reversing the judgment of the District Court, the Court of Appeals has created doubt and uncertainty with respect to the force and effect of the Act of Congress of March 2, 1927 (44 Stat. 1335) and August 5, 1939 (53 Stat. 1212), R.S. § 4904 (35 USC § 52), R.S. § 4910 (35 USC § 58), R.S. § 4911 (35 USC § 59a) and R.S. § 4915 (35 USC § 63), upon which the judgment of the District Court has been made to rest. The questions so decided have not been, but should be settled by this Court	14
Point 2.—The United States Court of Appeals for the District of Columbia has not given proper effect to the decisions of this Court in *Butterworth* v. *Hoe*, 112 U. S. 50, and *Ewing* v. *Fowler Car Co.*, 244 U. S. 1, 3-4, the former of which held with respect to the jurisdiction of the Secretary of the Interior, under R.S. § 441, that the effective supervision and direction which the head of a department may exercise over his subordi-	

Page

nates in matters administrative and executive do not extend to matters in which the subordinate is directed by statute to act judicially. The latter case (244 U. S. 1, 3-4) stated that the "Regulations known as 'Rules of Practice in the United States Patent Office' * * * govern the declaration of interferences between pending conflicting applications and have the force and effect of law binding as well upon the Commissioner as upon the applicant for patents"..... 18

Conclusion..... 21

Appendix..... 22

TABLE OF CASES.

Anderson v. Walch, 152 F. 2d 975 (C. C. P. A. 1946)... 5
Avery v. Chase, 101 F. 2d 2005 (C. C. P. A. 1939)..... 5
Bendix Aviation Corp'n v. Conway P. Col. Com. of Pats.....4, 16
Butterworth v. Hoe, 112 U. S. 50 (1884)....6, 7, 9, 11, 18, 19
Ewing v. Fowler Car Co., 244 U. S. 1 (1917)....5, 11, 18, 20
Garfield v. Goldsby, 211 U. S. 249 (1908)..... 2
Goss v. Scott, 1901 C. D. 80..... 6
Hoover Co. v. Coe, 325 U. S. 79 (1945)..... 17
Horton, In Re, 58 Fed. 2d 682 (C. C. P. A. 1932)..... 5
Manny v. Easley v. Greenwood, Jr., 1889 C. D. 179.... 6
Potter v. Dixon, 19 Fed. Cas. 1145-1146, No. 11,325 (C. C. S. D. N. Y. 1863)..... 16
Raulet and Nicholson v. Adams, 1905 C. D. 55..... 5
Steinmetz v. Allen, 192 U. S. 543 (1904)..... 9
Waite v. Macy, 246 U. S. 606 (1918)..... 2, 6
Westinghouse Traction Brake Co. v. Christensen, 243 Fed. 901 (C. C.A. 3rd 1917)..... 5
Wigton v. Coe, 68 F. 2d 414 (App. D. C. 1933..... 6

STATUTES.

Act of Congress March 2, 1927 (44 Stat. 1335) 5, 6, 7, 10, 11, 14
Act of Congress August 5, 1939 (53 Stat. 1212) 5, 6, 7, 10, 11, 14, 15

Page

D. C. Code, tit. 11, §§ 305, 306, 315, 316 (1940) 8
R. S. § 441 (Rev. Stat. Chap. 2, June 22, 1874) 8, 18
R. S. § 481 (35 USC § 6) 6, 7, 8, 9, 10, 14, 19
R. S. § 483 (35 USC § 6) 7, 9, 10, 11, 14, 19, 20
R. S. § 4904 (35 USC § 52) 7, 10, 11, 14, 15
R. S. § 4909 (35 USC § 57) 15
R. S. § 4910 (35 USC § 58) 7, 14, 15
R. S. § 4911 (35 USC § 59a) 7, 10, 11, 14
R. S. § 4915 (35 USC § 63) 3, 10, 14, 15, 17
U. S. Judicial Code § 240a 9

PATENT OFFICE RULES.

Rule 97 .....6, 8, 9
Rule 101 .....6, 8, 9
Rule 102 ..... 8, 9
Rule 116 .....3, 6, 8, 9
Rule 119 15
Rule 122 ..... 3, 6
Rule 124 .....5, 6, 10, 15, 16, 20
Rule 159 32

TEXT BOOKS.

I Revise and Caesar, Interference Law & Practice 25, § 10 5

APPENDIX.

R. S. Section 441 22
R. S. Section 4904 22
R. S. Section 4909 22
R. S. Section 4910 23
Act of March 2, 1927 (44 Stat. 1335-1336).....23-27
Act of August 5, 1939 (53 Stat. 1212).....27-28
R. S. Section 4914 29
Rule 97 29
Rule 101 30
Rule 102 30
Rule 116 30
Rule 119 30
Rule 122 31
Rule 124 31
Rule 159 32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No.

CARTER CARBURETOR CORPORATION, *Petitioner,*

v.

LAWRENCE C. KINGSLAND, *Commissioner of Patents, Respondent.*

PETITION OF CARTER CARBURETOR CORPORATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To The Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Carter Carburetor Corporation, respectfully prays for a writ of certiorari to the United States Court of Appeals for the District of Columbia to review a judgment of that Court entered on May 25, 1948, which reversed the judgment of the District Court of the United States for the District of Columbia in Civil Action No. 37,782, *Carter Carburetor Corporation, Plaintiff* v. *Casper W. Ooms, Commissioner of Patents, Defendant.*

A certified transcript of the record in the case, with the necessary additional copies thereof, including the proceedings in the Court of Appeals for the District of Columbia, is furnished herewith in accordance with the provisions of Rule 38 of this Court.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

The writ of certiorari herein applied for seeks a review and reversal by this Court of the final judgment of the Court of Appeals of the District of Columbia which reversed the final judgment of the District Court of the United States for the District of Columbia in Civil Action No. 37,782, *Carter Carburetor Corporation, plaintiff* v. *Casper W. Ooms, Commissioner of Patents, defendant.*[1]

The District Court (Judge Letts sitting) adjudged (R. 26) that the Commissioner of Patents was without jurisdiction or authority in law to make his order of July 19, 1946, in Interference No. 82,262, *Hunt* v. *Coffey*, which reversed a decision of the Examiner of Interferences (R. 28) dismissing Hunt's motion to shift the burden of proof.[2]

The question of the Commissioner's jurisdiction to make his challenged order arose in that:

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[1] The present Commissioner has been duly substituted as a party defendant.

[2] The judgment of the District Court also commanded the Commissioner of Patents to vacate and set aside his order, to dismiss the so-called petition of Hunt upon which that order was based, and commanded the Commissioner of Patents to make and enter an order directing the Examiner of Interferences, having jurisdiction of Interference No. 82,262, and related interferences No. 82,554 and No. 82,555, to disregard the invalid and void order of the Commissioner entered July 19, 1946 in Interference No. 82,262. Such commands were corollaries under the doctrine of *Garfield* v. *Goldsby*, 211 U.S. 249, 261, and *Waite* v. *Macy*, 246 U.S. 606, 608-609, of the conclusion that the Commissioner was without jurisdiction to make his challenged order.

(1) Of the applications involved in Interference No. 82,262, Coffey's was the first to be filed.[3] That raised the presumption that Coffey was the prior inventor and imposed upon Hunt "the burden of proof" to establish a different state of facts, (Patent Office Rule 116).[4]

(2) Acting under Rule 122 Hunt moved to shift the burden of proof.

He based his motion upon (a) a joint application of himself and one Olson filed before Coffey's application was filed,[5] and upon (b) a decision of the District Court of the United States for the District of Columbia, made April 17, 1944, in *Bendix Aviation Corporation* v. *Conway P. Coe, Commissioner of Patents,* Civil Action 20,023, brought under R.S. § 4915, wherein it was held that the subject-matter of claims of Hunt's application sole now involved as counts in Interference No. 82,262 declared January 14, 1946, is disclosed in the Hunt and Olson joint application, and that Hunt is entitled to the filing date thereof for a constructive reduction to practice of those claims. Neither Carter, nor Coffey (nor Carter's assignor Henning, a party to related Interference No. 82,554) was a party or privy to Civil Action 20,023 (R. 55).

(3) For the reasons stated by him, the Examiner of Interferences dismissed Hunt's motion to shift without preju-

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[3] Coffey's Application S.N. 679,201 which eventuated June 29, 1937 in Patent No. 2,085,351, was filed July 6, 1933; Hunt's Application S.N. 727,648 was filed May 6, 1934.

Hunt's application was assigned to Bendix Aviation Corporation, hereinafter called "Bendix"; and Coffey's to Carter Carburetor Corporation, hereinafter called "Carter".

[4] "116. The parties to an interference will be presumed to have made their inventions in the chronological order in which they filed their completed applications for patents clearly disclosing same; and the burden of proof will rest upon the party who shall seek to establish a different state of facts. * * * "

[5] The Hunt and Olson joint application was S.N. 575,025. It was filed November 14, 1931, and assigned to Bendix. It was forfeited for non-payment of the final fee before Interference No. 82,262 was declared.

dice to his right to urge at final hearing that he be given the benefit of the joint application (R. 28).

(4) Upon that dismissal Hunt "petitioned" the Commissioner (R. 31) to "review and reverse" that ruling. Coffey (Carter) opposed the granting of that "petition".

(5) On July 19, 1946 the Commissioner of Patents, acting through The Honorable Thomas F. Murphy, Assistant Commissioner, entered upon Hunt's petition an order (R. 34) which, after referring to the decision of the District Court in Civil Action No. 20,023, provided:

> "Coffey was not a party to the proceeding in the District Court, and its decision is not *res judicata* as to him but, in accordance with the settled practice, the Patent Office will accept the Court's decision as correct, unless it is shown not to be so. *Prima facie*, therefore, Hunt is entitled, in this proceeding, to the benefit of the filing date of the joint application, and the primary examiner should have accorded him the benefit of this date in setting up the interference. Hunt, therefore, should be made the senior party, without consideration of his motion to shift the burden of proof. * * * this question should not be further considered at the interlocutory stage, but should be disposed of at final hearing. The petition is granted to the extent indicated."

(6) Coffey twice petitioned (R. 64, 85) the Commissioner of Patents to vacate that order. The Commissioner denied each of Coffey's petitions (R. 76, 93). Coffey also filed before the Examiner of Interferences a motion (R. 78) to shift the burden of proof, which had been imposed upon him pursuant to the order of the Commissioner, back to the party Hunt. The Examiner of Interferences, basing his action on the Commissioner's order of July 19, 1946, refused consideration (R. 84) of that motion.

(7) Thereupon, Carter (Coffey's assignee) filed its complaint (R. 1) in the District Court challenging the jurisdiction of the Commissioner to make his order aforesaid.[6]

(8) In arriving at its judgment that the Commissioner was without jurisdiction to enter the challenged order, the District Court[6a] held, *inter alia*, (R. 17-25) that the Rules of the Patent Office have the force of a statute and are as binding upon the Commissioner as upon applicants for patents and parties to interferences;[7] that the question involved in what is termed "the burden of proof is essentially a matter of evidence * * *" and the decision upon that question may dispose of the question of priority of invention;[8] that in reaching his decision, dismissing Hunt's motion to shift the burden of proof, the Examiner of Interferences exercised judgment and discretion, and his act in so doing was judicial, or *quasi judicial*, in character; that the Commissioner was without appellate jurisdiction;[9] that Hunt's petition was in fact and substance an appeal to the Commissioner; that the order thereon was in violation of law and the Rules of the Patent Office, and that (R. 24)

> "11. Hunt's petition to 'review and reverse the ruling of the Examiner of Interferences dismissing Hunt's motion to shift the burden of proof' was not addressed to the Commissioner in view of his supervisory authority. The action taken thereon by the Commissioner may not be upheld on such hypothesis. His

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[6] The hearing in that Court, upon Carter's motion for a preliminary injunction, was converted, by stipulation, into a final hearing on the record then before that Court.

[6a] Judge Letts sat in the District Court in Civil Action No. 20,023 and later in Carter's action against the Commissioner.

[7] *Ewing* v. *Fowler Car Co.*, 244 U.S. 1, 3-4; *Westinghouse Traction Brake Co.* v. *Christensen*, 243 Fed. 901, 905 (C.C.A. 3); *Anderson* v. *Walch*, 152 Fed. (2d) 975; *Avery* v. *Chase*, 101 Fed. (2d) 205, 210; *In Re Horton*, 58 Fed. (2d) 682; *Interference Law and Practice*, by Revise and Ceasar, Vol 1, p. 25, § 10.

[8] *Raulet and Nicholson* v. *Adams*, 1905 C.D. 55; 114 O.G. 1827.

[9] Acts of Congress of March 2, 1927 (44 Stat. 1335), and of August 5, 1939 (53 Stat. 1212); Patent Office Rule 124.

order of July 19, 1946 was not an exercise of supervisory power but was a review of the decision of the Examiner of Interferences, and in disregard and violation of Rules of Practice in the United States Patent Office Nos. 97, 101, 116, 122, and 124 which have the force and effect of a statute, and in violation of the Act of Congress of March 2, 1927 (44 Stat. 1335) as amended by the Act of Congress of August 5, 1939 (53 Stat. 1212). A petition may not be entertained by the Commissioner when it seeks to obtain indirectly a review of an examiner's judicial or *quasi judicial* decision from which no direct appeal lies by merely misnaming the action and calling it a petition. *Goss* v. *Scott*, 1901 C.D. 80; *Manny* v. *Easley* v. *Greenwood, Jr.*, 1889 C.D. 179, 181; *Waite* v. *Macy*, 246 U.S. 606, 608.

"12. The executive supervision and direction which the head of a department may exercise over his subordinate in matters administrative and executive do not extend to matters in which the subordinate is directed by statute or rule having the force of statute to act judicially, or *quasi judicially*. *Butterworth v. Hoe*, 112 U. S. 50."

(9) In reversing the judgment of the District Court, the Court of Appeals said (R. 120):

"We think the court erred. Rule 124 does not apply, for neither the primary examiner nor the Assistant Commissioner rendered a decision on Hunt's motion to shift the burden of proof. Moreover, even if both had rendered decisions on that motion each would have been acting within his authority. The absence of a right of appeal to the Commissioner where Rule 124 applies does not mean that he cannot exercise his supervisory authority on request. *Wigton* v. *Coe*, 62 App. D. C. 367, 68 F. (2d) 414, *cert. denied*, 291 U. S. 677. The difference between the two processes is much like that between appeal and certiorari. The Patent Office Rules not only do not but could not limit the Commissioner's supervisory authority. For R. S. § 481 as amended, 35 U. S. C. § 6, provides that 'The Commissioner of Patents, under the direction of the Secretary of Commerce, shall superintend or perform all

duties respecting the granting and issuing of patents * * *' The Commissioner cannot abdicate this statutory duty of superintendence. It is therefore immaterial that he may establish regulations 'not inconsistent with law' for the conduct of proceedings in the Patent Office. R. S. § 483 as amended, 35 U.S.C. § 6."

The decision of the Court of Appeals (R. 119) views R. S. § 481 (35 USC § 6) as a paramount and overriding statute and construes it as conferring upon the Commissioner of Patents unlimited and unrestrained jurisdiction and power over all matters within the Patent Office affecting the granting of patents to inventors. That decision seems to hold that rules of the Patent Office made in conformity with R. S. § 483 (35 USC § 6) can in no wise affect the supervisory jurisdiction of the Commissioner under R. S. § 481. That decision is believed to assert that the Commissioner's power of supervision extends to and embraces all the official acts of all other Patent Office officials without regard to any distinction between those acts which are merely ministerial and those which are judicial, or *quasi judicial* in their nature, and to confer upon the Commissioner all the powers of an appellate tribunal although an appeal to him is not only not provided, but is specifically denied by a statute or by Patent Office rule or by both.

The decision of the Court of Appeals silently sweeps away, as without significance or effect, the Acts of Congress of March 2, 1927 (44 Stat. 1335) and August 5, 1939 (53 Stat. 1212) which repealed R.S. § 4910 (35 USC § 58), amended R.S. § 4911 (35 USC § 52) and R.S. § 4904 (35 USC § 59a), which latter amendment conferred upon a Board of Interference Examiners exclusive jurisdiction to determine in the Patent Office the question of priority of invention.

The decision of the Court of Appeals sweeps aside, in silence, as unworthy of notice or comment, the exhaustive decision of this Court in *Butterworth* v. *Hoe*, 112 U.S. 50, which, in determining the supervisory powers of the Secre-

tary of the Interior, under R.S. § 441, of public business relating to "Patents for Inventions", held that the effective supervision and direction which the head of a department may exercise over his subordinates in matters administrative and executive do not extend to matters in which the subordinate is directed by law to act judicially. In fact, the decision of the Court of Appeals ignores substantially all of the conclusions of law of the District Court (33 USPQ 278) and substitutes in their stead, under the asserted authority of R.S. § 481, unrestrained and unlimited supervisory power available to the Commissioner whenever he asserts that any act done by him, regardless of its nature, is done in the exercise of his supervisory power.

Although the questions presented to the District Court, to the Court of Appeals and, herein, to this Court, stem from the fixing by the Commissioner of Patents of the whereabouts of the burden of proof elsewhere than as fixed by Patent Office Rule 116 in an interference declared in conformity with Patent Office Rules 97, 101 and 102, the questions so presented are basic in their nature in relation to the extent of the jurisdiction of the Commissioner, the construction and application of statutes of the United States and the proper effect of decisions of this Court, and to the validity and binding force upon the Commissioner of the Patent Office Rules.

The public interest in the jurisdiction of the Patent Office officials and particularly in the jurisdiction of the Commissioner of Patents is, manifestly, relatively as great as the public interest in the jurisdiction of any other tribunal in the exercise of asserted power.

JURISDICTION.

(1) This is a suit founded upon District of Columbia Code (1940) Title 11, §§ 305, 306, 315 and 316, against the Commissioner of Patents for a judgment that an order made by him in an interference proceeding was in contravention of statutes of the United States and applicable

rules of practice in the United States Patent Office established pursuant to statute, and was made by the Commissioner of Patents in excess of his jurisdiction.

(2) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 USC § 347a).

(3) The date of the judgment of the United States Court of Appeals for the District of Columbia which petitioner seeks to have reviewed is May 25, 1948 (R. 121).

(4) Cases believed to sustain the jurisdiction are:

Butterworth v. *Hoe*, 112 U.S. 50;

Steinmetz v. *Allen*, 192 U.S. 543.

QUESTIONS PRESENTED.

I. Does R. S. § 481 (35 USC § 6) confer upon the Commissioner of Patents jurisdiction

(A) To review a judicial or quasi judicial decision of a subordinate made in conformity with applicable Patent Office Rules from which appellate review by the Commissioner is denied, or not provided for, by statute or Patent Office rule;

(B) To nullify, or render ineffective as to him, regulations established in conformity with R. S. § 483 (35 USC § 6), known as "Rules of Practice in the United States Patent Office", whether such regulations relate to substantive or adjectival law, or authorize the making of judicial or quasi judicial decisions by a subordinate;

(C) To fix the whereabout of the burden of proof in an Interference declared in conformity with Patent Office Rules 97, 101 and 102 otherwise than as fixed by Patent Office Rule 116, and decisions of the primary examiner and the Examiner of Interferences made in conformity with rules of the Patent Office?

II. Do not the Acts of Congress of March 2, 1927 (44 Stat. 1335) and August 5, 1939 (53 Stat. 1212), as well as Patent Office Rule 124, deny to the Commissioner of Patents jurisdiction to review a decision of a subordinate, made in conformity with the applicable statutes and Patent Office Rules and involving an evaluation of evidence, if such decision of the Commissioner may affect the determination by the Board of Interference Examiners of the issue of priority of invention in the exercise of its jurisdiction pursuant to R. S. § 4904 (35 USC § 52) as amended?

III. Does R. S. § 4915 confer upon the Commissioner of Patents jurisdiction and require him to give effect to a decision in an action under that section against a party to a subsequent interference who was not a party or privy to the R. S. § 4915 action?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(1) The United States Court of Appeals for the District of Columbia has decided questions of substance relating to the construction of R.S. § 481 (35 USC § 6) and its application to and effect upon R.S. § 483 (35 USC § 6) and the regulations made thereunder. Thereby, and by its judgment founded thereon reversing the judgment of the District Court, the Court of Appeals has created doubt and uncertainty with respect to the force and effect of the Acts of Congress of March 2, 1927 (44 Stat. 1335) and August 5, 1939 (53 Stat. 1212), R.S. § 4904 (35 USC § 52), R.S. § 4910 (35 USC § 58), R.S. §4911 (35 USC § 59a) and R.S. § 4915 (35 USC § 63), upon which the judgment of the District Court had been made to rest. The questions so decided have not been, but should be settled by this Court.

(2) The United States Court of Appeals for the District of Columbia has not given proper effect to the decisions

of this Court in *Butterworth* v. *Hoe*, 112 U.S. 50 and *Ewing* v. *Fowler Car Co.*, 244 U.S. 1, 3-4, the former of which held with respect to the jurisdiction of the Secretary of Interior, under R.S. § 441, that the effective supervision and direction which the head of a department may exercise over his subordinates in matters administrative and executive do not extend to matters in which the subordinate is directed by statute to act judicially. The latter case (244 U.S. 1, 3-4) stated that the "regulations known as 'Rules of Practice in the United States Patent Office' * * * govern the declaration of interferences between pending conflicting applications and have the force and effect of law binding as well upon the Commissioner as upon the applicant for patents".

Those decisions, ignored by the Court of Appeals, are believed applicable to a proper decision of the questions presented in this case to that Court. The public is vitally affected by a decision of a court of last resort (save by review by this Court) which holds in effect that the jurisdiction of the head of the Patent Office, in the exercise of his asserted supervisory power, is not restrained or limited by (a) regulations established pursuant to R.S. § 483; (b) the Acts of the Congress of March 2, 1927 (44 Stat. 1335) and August 5, 1939 (53 Stat. 1212), R.S. § 4904 (35 USC § 52) and R.S. § 4911 (35 USC § 59a), as amended; or, (c) applicable decisions of this Court.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued out of this Court directed to the United States Court of Appeals for the District of Columbia commanding such Court to certify and send to this Court, on a day to be designated, a full transcript of the record and all proceedings of that Court had in this case, to the end that this case may be reviewed and determined by this Court; that the judgment of that Court in this case

be reversed; and that Petitioner be granted such other and further relief as may seem proper.

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Of Counsel

Dated: June 25, 1948.

BRIEF IN SUPPORT OF PETITION.

Opinions of the Courts Below.

The opinion of the District Court in the form of Findings of Fact and Conclusions of Law is reported in 73 USPQ 278. It has not been officially reported. It is printed, with an unpublished memorandum opinion, in the Record at pp. 15-25 inclusive.

The opinion of the United States Court of Appeals for the District of Columbia is not yet reported. It is printed in the Record at pages 119-121.

Statement.

The facts are believed to be sufficiently stated in the petition (ante pages 2-8).

Specification of Errors.

For the errors which Petitioner will urge, if the certiorari is granted, the Court is respectfully referred to that part of the petition which sets forth the question presented (ante pages 9-10).

Summary of Argument.

The points of argument are the reasons relied upon for the allowance of the writ (ante, pages 10-11).

Argument.

Point I.

The United States Court of Appeals for the District of Columbia has decided questions of substance relating to the construction of R. S. § 481 (35 USC § 6) and its application to and effect upon R. S. § 483 (35 USC § 6) and the regulations made thereunder. Thereby, and by its judgment founded thereon reversing the judgment of the District Court, the Court of Appeals has created doubt and uncertainty with respect to the force and effect of the Acts of Congress of March 2, 1927 (44 Stat. 1335) and August 5, 1939 (53 Stat. 1212), R. S. § 4904 (35 USC § 52), R. S. § 4910 (35 USC § 58), R. S. § 4911 (35 USC § 59a) and R. S. § 4915 (35 USC § 63), upon which the judgment of the District Court had been made to rest. The questions so decided have not been, but should be settled by this Court.

Does R.S. § 481 have such potency and dominance over R.S. §483 that both R.S. § 483 and the regulations made thereunder, with the approval of the Secretary of Commerce, may be made wholly ineffective as against the Commissioner by his labeling any act of whatsoever nature done by him or a subordinate "Done Under Supervisory Authority"? May he likewise, notwithstanding the purpose and intent of the Acts of the Congress which took away his appellate jurisdiction to determine the question of priority of invention, make decisions which affect or determine that question?

The District Court rested its judgment, reversing the challenged order of the Commissioner (R. 24), in part upon the aforesaid Acts of the Congress (A. 23-27)[1] of March 2, 1927 (44 Stat. 1335) and August 5, 1939 (53 Stat. 1212).

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[1] Refers to Appendix to Petitioner's Brief, printed post at pages 22 to 23.

The Court of Appeals failed or refused to give legal consequence or effect to those Acts and to the Acts amended thereby. Its statement that the difference between the appeal referred to in Rule 124 and the exercise by the Commissioner of supervisory authority is "much like that between appeal and certiorari" (R. 121) is necessarily founded upon the assumption that the Commissioner is vested with appellate judicial jurisdiction over interferences. That assumption disregards in silence the fact that R.S. § 4910 (35 USC § 58), which had conferred upon the Commissioner appellate jurisdiction over the decision of the Patent Office Board theretofore possessing jurisdiction "to determine the question of priority of invention", (R.S. § 4909; 35 USC § 57) was expressly repealed by § 6 of the Act of 1927 (A. 24). It passed without reference thereto the fact that the Act of 1939 (A. 27) by its amendment of R.S. § 4904 (35 USC § 52) conferred upon "a Board of three Examiners of Interferences" exclusive jurisdiction in the Patent Office "to determine the question of priority of invention". It also left unmentioned the further fact that the Act of 1939 provided for appeals from decisions of that Board of Examiners of Interferences only to the United States Court of Customs and Patent Appeals—not to the Commissioner. It left wholly unnoticed the consequences of the fact that by those Acts of the Congress the fact finding decision on the question of priority of invention was made to by-pass the Commissioner and was imposed upon another statutory tribunal. The Court of Appeals left unobserved the fact that Rule 124, in its present form, was made effective as of October 5, 1939, the very day upon which the Act of August 5, 1939 became effective.

The Court of Appeals completely disregards the self-evident fact, recognized by Patent Office Rule 119, that a decision upon the question of burden of proof may dispose of the question of priority of invention, particularly under an order of the Commissioner which says, as does the Commissioner's order (R. 35) here challenged, that

> " * * * the Patent Office (which includes the Board of three Interference Examiners)[2] will accept the Court's decision as correct unless it is shown not to be so."

Yet, the Court of Appeals says (R. 120-121):

> "The absence of a right of appeal to the Commissioner where Rule 124 applies does not mean that he cannot exercise his supervisory authority on request. * * * The difference between the two processes is much like that between appeal and certiorari. The Patent Office rules not only do not but could not limit the Commissioner's supervisory authority."

Does that mean that Rule 124 is invalid? Does that mean that all the Patent Office rules made under and pursuant to R.S. § 483 (35 USC § 6) are invalid, or at least not binding upon the Commissioner with respect to any act of the Commissioner, or of a subordinate, regardless of whether such act is ministerial, judicial, or quasi judicial in its nature, if the Commissioner asserts that such act is done under his supervisory authority conferred by R.S. § 481? Are the regulations established pursuant to R.S. § 483 (35 USC § 6) with the approval of the Secretary of Commerce, to be so devitalized or nullified by the Commissioner whenever he so wills?

Upon what authority does the Patent Office base its jurisdiction to give effect in the Interference *Hunt (Bendix)* v. *Coffey (Carter)* to the decision of the District Court in *Bendix Aviation Corporation* v. *Conway P. Coe, Commissioner of Patents,* Civil Action No. 20,023, an R. S. § 4915 action to which neither Coffey nor Carter was a party or privy?

In *Potter* v. *Dixon,* 19 Fed. Cas., No. 11,325, pp. 1145-1146, Mr. Justice Nelson, sitting at Circuit, said:

> "* * * a hearing and decision between the applicant for a patent and A, whether in favor of the one or the other, forms no rule for a decision between the appli-

[2] Parenthetical statement is supplied by counsel.

> cant and B, in case of an interference declared between them. The proceedings are independent and inter alios."

In *Hoover Co.* v. *Coe*, 325 U. S. 79, this Court, comparing R. S. § 4915 and R. S. § 4914, said that in the one case the adjudication in equity authorizes issue of a patent on the applicant's "otherwise complying with the requirements of law"; in the other, the decision "shall govern the further proceedings in the case" in the Patent Office. At page 88 this Court said that Congress "* * * has made the effect of adjudication in equity the same as that of decision on appeal".

This Court then quoted (325 U. S. 88) a statement of the Commissioner of Patents which seems to indicate that R. S. § 4915 does not authorize or require that a decision made in an action brought under that section against the Commissioner of Patents shall be given effect against a party to a subsequent interference who was not party or privy to the R. S. § 4915 action brought against the Commissioner. The quoted statement seems rather to indicate that the party in whose favor the R. S. § 4915 decision was rendered must await determination of the subsequent interference, whereupon, if he is the successful party to that interference, he may enforce the R. S. § 4915 decision against the Commissioner.

Consequently, the Court of Appeals, in validating the order of the Commissioner which provided that

> "Coffey was not a party to the proceedings in the District Court, and its decision is not *res judicata* as to him but, in accordance with the settled practice, the Patent Office will accept the Court's decision as correct, unless it is shown not to be so. * * *"

conferred jurisdiction upon the Commissioner that is believed to find no support in the law. The effect of the decision of the Court of Appeals upon that point increases the confusion and uncertainty otherwise created by the decision of that Court.

Should not the confusion and uncertainty in which those matters are left by the decision of the Court of Appeals be dispelled in the interest of the public by a decision of this Court upon the "Questions Presented" in the foregoing Petition?

Point II.

The United States Court of Appeals for the District of Columbia has not given proper effect to the decisions of this court in Butterworth v. Hoe, 112 U. S. 50, and Ewing v. Fowler Car Co., 244 U. S. 1, 3-4, the former of which held with respect to the jurisdiction of the Secretary of the Interior, under R. S. § 441, that the effective supervision and direction which the head of a department may exercise over his subordinates in matters administrative and executive do not extend to matters in which the subordinate is directed by statute to act judicially. The latter case (244 U. S. 1, 3-4) stated that the "Regulations known as 'Rules of Practice in the United States Patent Office' * * * govern the declaration of interferences between pending conflicting applications and have the force and effect of law binding as well upon the Commissioner as upon the applicant for patents."

It would seem that the confusion and uncertainty by which the members of the public, having relations with the Patent Office, are perturbed and burdened as a result of the decision of the Court of Appeals exists because of the failure of the Court of Appeals to give proper effect to the decisions of this Court in *Butterworth* v. *Hoe*, 112 U. S. 50 and *Ewing* v. *Fowler Car Co.*, 244 U. S. 1, 3-4.

(A) *Butterworth* v. *Hoe* was decided in 1884. R. S. § 441 then provided:

> "The Secretary of the Interior is charged with the supervision of public business relating to the following subjects: * * * Fifth: Patents for inventions. * * *"

The Secretary of the Interior, asserting a right so to do under the authority of that satute, reversed the finding of the Commissioner of Patents upon the question of priority of invention. He there claimed that under that statute and under R. S. § 481 and R. S. § 483 his powers of supervision and direction extended

> "to all the official acts of the Commissioner, without regard to any distinction between those which are merely ministerial and those which are judicial in their nature; and that such supervision and direction may be exerted at any stage of a proceeding, in the discretion of the Secretary, whether in advance, or during its progress, or after its termination, and embraces, therefore, the mode of appeal, though no appeal, in express terms, is actually given." (112 U. S. 55)

This Court in its exhaustive opinion said: (112 U. S. 63)

> "The law gives express appeals from the decision of the Commissioner, or, in cases where technical appeals are not given, other modes of review by judicial process. It gives no such appeal from him to the Secretary. If it exists, it is admitted it is only by an implication, which discovers an appeal in the power of direction and superintendence. That power does not necessarily, *ex vi termini*, include a technical appeal; and the principle applies that where a special proceeding is expressly ordained for a particular purpose it is presumably exclusive."

And at 112 U. S. 67:

> "The conclusion cannot be resisted that, to whatever else supervision and direction on the part of the head of the department may extend, in respect to matters purely administrative and executive, they do not extend to a review of the action of the Commissioner of Patents in those cases in which, by law, he is appointed to exercise his discretion judicially. It is not consistent with the idea of judicial action that it should be subject to the direction of a superior, in the sense in which that authority is conferred upon the head of an executive department in reference to his subordi-

> nates. Such a subjection takes from it the quality of a judicial act."

Had the Court of Appeals not disregarded that decision of this Court, but had it applied its doctrine to the case at bar as did the District Court (R. p. 24, para. 12) it is believed that order and certainty, with respect to the extent of the jurisdiction of the Commissioner and with respect to the rights of the public under the acts of the Congress and the Rules of the Patent Office, would have resulted from the decision of the Court of Appeals instead of the confusion and uncertainty that now exists with respect to those matters.

(B) In *Ewing* v. *Fowler Car Co.*, 244 U. S. 1, 3-4, the Court, after quoting R. S. § 483, said in the statement of the case:

> "Pursuant to this authority regulations known as 'Rules of Practice in the United States Patent Office' have been established by the Commissioner by and with the approval of the Secretary of the Interior and now govern the declaration of interferences between pending conflicting applications and have the force and effect of law, binding as well upon the Commissioner as upon the applicant for patents."

Had there been any doubt whatever in the mind of the Court of the accuracy of that statement, it is inconceivable that it would have been made in the "Statement of the Case".

Yet, in the case at bar, the Court of Appeals completely disregards that long-established doctrine which was relied upon by the District Court (R. p. 23, para. 6) and substitutes in its place the unsettling doctrine that:

> "* * * The absence of a right of appeal to the Commissioner where Rule 124 applies does not mean that he cannot exercise his supervisory authority on request. * * * The Patent Office rules not only do not but could not limit the Commissioner's supervisory authority."

Unless and until the "QUESTIONS PRESENTED" in the foregoing petition are determined and settled by this Court, the unhappy condition of confusion and uncertainty arising from the decision of the Court of Appeals, with respect to the jurisdiction and powers of the respective Patent Office tribunals and with respect to the rights of applicants for patents and parties to interferences, will inevitably continue to the detriment of the public.

CONCLUSION.

WHEREFORE, the Petitioner earnestly prays that the petition for writ of certiorari be granted, the cause reviewed and the decree of the United States Court of Appeals for the District of Columbia be reversed.

Respectfully submitted,

HUGH M. MORRIS,
GILBERT P. RITTER,
Attorneys for Petitioner.

GEORGE R. ERICSON,
Of Counsel.

APPENDIX.

REVISED STATUTES AS THEY APPEARED AT THE TIME OF THE ENACTMENT OF THE ACT OF CONGRESS OF MARCH 2, 1927 (44 Stat. 1335)

"Sec. 441. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:

First. The census; when directed by law.
Second. The public lands, including mines.
Third. The Indians.
Fourth. Pensions and bounty-lands.
Fifth. Patents for inventions.
Sixth. The custody and distribution of publications.
Seventh. Education.
Eighth. Government Hospital for the Insane.
Ninth. Columbia Asylum for the Deaf and Dumb."

R. S. § *4904;* 35 USC § 52 read as follows:

"*Interferences; determination of priority; issue of patent.* Whenever an application is made for a patent which, in the opinion of the commissioner, would interfere with any pending application, or with any unexpired patent, he shall give notice thereof to the applicants, or applicant and patentee, as the case may be, and shall direct the primary examiner to proceed to determine the question of priority of invention. And the commissioner may issue a patent to the party who is adjudged the prior inventor, unless the adverse party appeals from the decision of the primary examiner, or of the board of examiners in chief, as the case may be, within such time, not less than twenty days, as the commissioner shall prescribe."

R. S. § *4909;* 35 U. S. C. § 57 read as follows:

"*Appeals; from primary examiners to examiners in chief.* Every applicant for a patent or for the reissue of a patent, any of the claims of which have been twice rejected, and every party to an interference, may appeal from the decision of the primary examiner, or of the examiner in charge of interferences in such

case, to the board of examiners in chief; having once paid the fee for such appeal."

R. S. § 4910; 35 U. S. C. § 58 read as follows:

"*Same; from examiners in chief to commissioner.* If such party is dissatisfied with the decision of the examiners in chief, he may, on payment of the fee prescribed, appeal to the commissioner in person."

ACT OF MARCH 2, 1927 (44 Stat. 1335-1336).

"Chap. 273.—An Act Amending the statutes of the United States as to procedure in the Patent Office and in the courts with regard to the granting of letters patent for inventions and with regard to interfering patents.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Section 4894 of the Revised Statutes of the United States be amended by striking out the words 'one year' wherever they appear and substituting therefor the words 'six months.'

"Sec. 2. That section 4897 of the Revised Statutes of the United States be amended by striking out the words 'two years' wherever they appear and substituting therefor the words 'one year,' and by striking out the words 'And upon the hearing of renewed applications preferred under this section, abandonment shall be considered as a question of fact.'

"Sec. 3. That section 482 of the Revised Statutes of the United States be amended to read as follows:

" 'Sec. 482. The examiners in chief shall be persons of competent legal knowledge and scientific ability. The Commissioner of Patents, the first assistant commissioner, the assistant commissioner, and the examiners in chief shall constitute a board of appeals, whose duty it shall be, on written petition of the appellant, to review and determine upon the validity of the adverse decisions of examiners

upon applications for patents and for re-issues of patents and in interference cases. Each appeal shall be heard by at least three members of the board of appeals, the members hearing such appeal to be designated by the commissioner. The board of appeals shall have sole power to grant rehearings.'

"Sec. 4. That section 4904 of the Revised Statutes of the United States be amended by striking out from the last sentence thereof the words 'or of the board of examiners in chief, as the case may be.'

"Sec. 5. That section 4909 of the Revised Statutes of the United States be amended by striking out the words 'board of examiners in chief' and substituting therefor the words 'board of appeals.'

"Sec. 6. That section 4910 of the Revised Statutes of the United States be, and the same is hereby, repealed.

"Sec. 7. That section 9 of the Act of February 9, 1893, entitled 'An Act to establish a court of appeals for the District of Columbia, and for other purposes' (Twenty-seventh Statutes at Large, page 434), be, and the same is hereby, repealed.

"Sec. 8. That section 4911 of the Revised Statutes of the United States be amended to read as follows:

" 'Sec. 4911. If any applicant is dissatisfied with the decision of the board of appeals, he may appeal to the Court of Appeals of the District of Columbia, in which case he waives his right to proceed under section 4915 of the Revised Statutes. If any party to an interference is dissatisfied with the decision of the board of appeals, he may appeal to the Court of Appeals of the District of Columbia, provided that such appeal shall be dismissed if any adverse party to such interference shall, within twenty days after the appellant shall have filed notice of appeal according to section 4912 of the Revised Statutes, file notice with the Commsisioner of Patents that he elects to have all further

proceedings conducted as provided in section 4915 of the Revised Statutes. Thereupon the appellant shall have thirty days thereafter within which to file a bill in equity under said section 4915, in default of which the decisions appealed from shall govern the further proceedings in the case. If the appellant shall file such bill within said thirty days and shall file due proof thereof with the Commissioner of Patents, the issue of a patent to the party awarded priority by said board of appeals shall be withheld pending the final determination of said proceeding under said section 4915.'

"Sec. 9. That section 4912 of the Revised Statutes of the United States be amended by striking out the words 'Supreme Court of the District of Columbia' and substituting therefor the words 'Court of Appeals of the District of Columbia.'

"Sec. 10. That section 4913 of the Revised Statutes of the United States be amended by striking out the words 'And at the request of any party interested, or of the court, the commissioner and the examiners may be examined under oath in explanation of the principles of the thing for which a patent is demanded.'

"Sec. 11. That section 4915 of the Revised Statutes of the United States be amended to read as follows:

" 'Sec. 4915. Whenever a patent on application is refused by the Commissioner of Patents, the applicant, unless appeal has been taken from the decision of the board of appeals to the Court of Appeals of the District of Columbia, and such appeal is pending or has been decided, in which case no action may be brought under this section, may have remedy by bill in equity, if filed within six months after such refusal; and the court having cognizance thereof, on notice to adverse parties and other proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case

may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication and otherwise complying with the requirements of law. In all cases where there is no opposing party a copy of the bill shall be served on the commissioner; and all the expenses of the proceedings shall be paid by the applicant, whether the final decision is in his favor or not. In all suits brought hereunder where there are adverse parties the record in the Patent Office shall be admitted in whole or in part, on motion of either party, subject to such terms and conditions as to costs, expenses, and the further cross-examination of the witnesses as the court may impose, without prejudice, however, to the right of the parties to take further testimony. The testimony and exhibits, or parts thereof, of the record in the Patent Office when admitted shall have the same force and effect as if originally taken and produced in the suit.

"Sec. 12. That section 4918 of the Revised Statutes of the United States be amended to change the phrase 'may adjudge and declare either of the patents void in whole or in part' to read as follows: 'may adjudge and declare either or both of the patents void in whole or in part, upon any ground.'

"Sec. 13. That section 4934 of the Revised Statutes of the United States be amended by striking out the following words: 'On an appael for the first time from the primary examiners to the examiners in chief, $10. On every appeal from the examiners in chief to the commissioner, $20,' and substituting therefor the words 'on an appeal for the first time from the primary examiners to the board of appeals, $15. On every appeal from the examiner of interferences to the board of appeals, $25.'

"Sec. 14. That where the day, or the last day, fixed by statute for taking any action or paying any fee in the United States Patent Office falls on Sunday, or on a holiday

within the District of Columbia, the action may be taken, or the fee paid, on the next succeeding secular or business day.

"Sec. 15. That this Act shall take effect two months after its approval; but it shall not affect appeals then pending and heard before the examiners in chief or pending before the Commissioner of Patents or in the Court of Appeals of the District of Columbia, and that in all cases in which the time for appeal from a decision of the examiners in chief or of the Commissioner of Patents or for amendment or renewal of application had not expired at the time this Act takes effect, appeals and other proceedings may be taken under the statutes in force at the time of approval of this Act as if such statutes had not been amended or repealed.

"Approved, March 2, 1927."

ACT OF AUGUST 5, 1939 (H. R. 6837) 53 STAT. 1212.

"To amend sections 4904, 4909, 4911 and 4915 of the Revised Statutes (U. S. C., title 35, secs. 52, 57, 59A and 63).

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 4904 of the Revised Statutes (U. S. C., title 35, sec. 52) be amended to read as follows:

" 'Whenever an application is made for a patent which, in the opinion of the Commissioner, would interfere with any pending application, or with any unexpired patent, he shall give notice thereof to the applicants, or applicant and patentee, as the case may be, and shall direct a board of three examiners of interferences to proceed to determine the question of priority of invention. And the Commissioner may issue a patent to the party who is adjudged the prior inventor.'

"Section 2. That section 4909 of the Revised Statutes (U. S. C., title 35, sec. 57) be amended to read as follows:

" 'Every applicant for a patent or for the reissue of a patent, any of the claims of which have been twice rejected, may appeal from the decision of the primary examiner to the Board of Appeals, having once paid the fee for such appeal.'

"Sec. 3. That section 4911 of the Revised Statutes (U. S. C., title 35, sec. 59a) be amended by changing the words 'Board of Appeals' in the second sentence to read 'board of interference examiners', and by canceling the last sentence of said section.

"Sec. 4. That section 4915 of the Revised Statutes (U. S. C., title 35, sec. 63) be amended by changing the first sentence thereof to read:

" 'Whenever a patent on application is refused by the Board of Appeals or whenever any applicant *is dissatisfied with the decision of the board of interference examiners,* the applicant, unless appeal has been taken to the United States Court of Customs and Patent Appeals, and such appeal is pending or has been decided, in which case no action may be brought under this section, may have remedy by bill in equity, if filed within six months after such refusal or decision; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim or for any part thereof, as the facts in the case may appear.'

"Sec. 5. That this Act shall take effect two months after its approval; but it shall not affect interferences then pending, which may be heard and decided and appeals and other proceedings taken under the statutes in force at the time of approval of this Act as if such statutes had not been amended.

"Approved, August 5, 1939."

Sec. 4914. R. S. (U. S. C., Title 35, Sec. 62.) The court, on petition, shall hear and determine such appeal, and revise the decision appealed from in a summary way, on the evidence produced before the commissioner at such early and convenient time as the court may appoint; and the revision shall be confined to the points set forth in the reasons of appeal. After hearing the case the court shall return to the commissioner a certificate of its proceedings and decision, which shall be entered of record in the Patent Office, and shall govern the further proceedings in the case. But no opinion or decision of the court in any such case shall preclude any person interested from the right to contest the validity of such patent in any court wherein the same may be called in question.

PATENT OFFICE RULES.

Rule 97:

"When an interference is found to exist and the applications are prepared therefor, the primary examiner shall forward to the interference division the files and drawings; notices of interference for all the parties (as specified in rule 103) disclosing the name and residence of each party and those of his attorney or agent, and of any assignee, and, if any party be a patentee, the date and number of the patent; the ordinals of the conflicting claims and the title of the invention claimed; and the issue, which shall be clearly and concisely defined in so many counts or branches as may be necessary in order to include all interfering claims. Where the issue is stated in more than one count the respective claims involved in each count shall be specified. The primary examiner shall also forward a statement *disclosing the applications involved in interference*, fully identified, *arranged in the inverse chronological order of the filing of the completed applications*, and also disclosing the issue or issues and the ordinals of the conflicting claims, the name and residence of any assignee, and the names and residences of all attorneys or agents, both principal and associate."

Rule 101:

"Upon the institution and declaration of the interference, as provided in rule 102, *the examiner of interferences will take jurisdiction* of the same, which will then become *a contested case.*"

Rule 102:

"When the notices of interference are in proper form, the examiner of interferences shall add thereto a designation of the time within which the preliminary statements required by rule 110 must be filed, and shall, pro forma, institute and declare the interference by forwarding the notices to the several parties to the proceeding."

Rule 116:

"The parties to an interference will be presumed to have made their inventions in the chronological order in which they filed their completed applications for patents clearly disclosing same; and the burden of proof will rest upon the party who shall seek to establish a different state of facts.

"The termination of the interference by dissolution under rule 122 without an award of priority shall not disturb this presumption, and a party enjoying the status of a senior party with respect to any subject-matter of his application shall not be deprived of any claim to such subject-matter solely on the ground that such claim was not added to the interference by amendment under rule 109."

Rule 119:

"Upon the filing of an affidavit by any senior party to an interference that the time for taking testimony on behalf of any junior party has expired and that no testimony has been taken by him, an order shall be entered that the junior party show cause within a time set therein, not less than ten days, why judgment should not be rendered against him, and in the absence of a showing of good and sufficient cause judgment shall be so rendered. If any showing be made in re-

sponse to the order, it must be served upon the opposing party and noticed for hearing by the party filing it."

Rule 122:

"Motions to dissolve an interference (1) alleging that there has been such informality in declaring the same as will preclude the proper determination of the question of priority of invention, or (2) denying the patentability of an applicant's claim, or (3) denying his right to make the claim, or (4) if the interference involves a design patent or an application, alleging that there is no interference in fact and also motions to shift the burden of proof, should contain a full statement of the grounds relied upon and should, if possible, be made within the time fixed by the examiner of interferences, not less than thirty days, after the statements of the parties have been received and approved. Such motions and all motions of a similar character, if in the opinion of the examiner of interferences they be in proper form, will be heard and determined by the primary examiner, due notice of the day of hearing being given by the office to all parties. If in the opinion of the examiner of interferences the motion be not in proper form, or if it be not brought within the time specified and no satisfactory reason be given for the delay, it will not be considered and the parties will be so notified.

"At a hearing on a motion to dissolve an interference between an application and a patent, the prior art of record in the patent file shall be referred to for the purpose of construing the issue. The matter raised on a motion to shift the burden of proof may be reviewed at final hearing."

Rule 124:

"No appeal will be permitted from a decision rendered on a motion brought under the provisions of rules 109 and 122.

"Appeals may be taken directly to the Commissioner from decisions on such other motions as, in his judgment, should be appealable."

(Rule 124 went into effect as above October 5, 1939, the day upon which the Act of August 5, 1939 (53 Stat. 1212) went into effect.) For years prior to the passage of the Act of March 2, 1927 (44 Stat. 1336) Rule 124 read thus:

> "124. Where, on motion for dissolution, the law examiner renders an adverse decision upon the merits of a party's case, as when he holds that the issue is not patentable or that a party has no right to make a claim, he shall fix a limit of appeal not less than twenty days from the date of his decision. Appeal lies to the *Examiners in chief in the first instance* and will be heard *inter partes*. If the appeal be not taken within the time fixed, it will not be entertained except by permission of the Commissioner.
>
> "No appeal will be permitted from a decision rendered upon motion for dissolution affirming the patentability of a claim or the applicant's right to make the same.
>
> "*Appeals may be taken directly to the Commissioner, except in the cases provided for in the preceding portions of this rule, from decisions on such motions as, in his judgment, should be appealable.*"

Upon the passage of the Act of March 2, 1927, Rule 124 was amended by striking out the words "examiners in chief in the first instance" and substituting therefor the words "Board of Appeals." In other respects Rule 124 remained unchanged until October 5, 1939. It was then put in its present form.

Rule 159:

> "* * * * * This rule is not to be so construed as to modify established rules of evidence, which will be applied strictly in all practice before the office."

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IN THE

Supreme Court of the United States

No. 123.

October Term, 1948.

CARTER CARBURETOR CORPORATION,
Petitioner,

v.

LAWRENCE C. KINGSLAND, Commissioner of Patents,
Respondent.

REPLY TO BRIEF FOR RESPONDENT.

HUGH M. MORRIS,
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Attorneys for Petitioner.

GEORGE R. ERICSON,
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INDEX.

SUBJECT INDEX.

	Page
Reply to Brief for Respondent	1
Conclusion	8

TABLE OF CASES.

Butterworth v. Hoe, 112 U. S. 50 (1884) 6, 7, 8
Ewing v. Fowler Car Co., 244 U. S. 1 (1917) 5, 6, 8

STATUTES.

Act of Congress March 2, 1927 (44 Stat. 1335) 3
Act of Congress August 5, 1939 (53 Stat. 1212) 3
RS § 441 (Rev. Stat. Chap. 2, June 22, 1874) 8
RS § 481 (35 USC § 6) 1, 2, 4, 5, 7
RS § 483 (35 USC § 6) 2, 4, 5, 6, 7
Executive Order of March 17, 1925, 332 O. G. 957 2

PATENT OFFICE RULES.

Rule 116 4

RULES OF SUPREME COURT OF THE UNITED STATES.

Rule 38, 4 (c) 4

IN THE

Supreme Court of the United States.

No. 123.

OCTOBER TERM, 1948.

CARTER CARBURETOR CORPORATION,

Petitioner,

v.

LAWRENCE C. KINGSLAND, COMMISSIONER OF PATENTS,

Respondent.

REPLY TO BRIEF FOR RESPONDENT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner's brief contains two points (pp. 14, 18). They are the "Reasons Relied on for Allowance of the Writ."

Respondent nowhere attempts to deny or even question the accuracy of any statement made in Petitioner's first "Reason Relied on for the Allowance of the Writ" (Br. of Pet'r., p. 10).

Respondent does not deny that the decision of the Court below relating to the construction of RS § 481, as amended [1] (35 USC § 6) and its application to and effect upon RS

[1] "Section 481. The Commissioner of Patents, under the direction of the Secretary of Commerce, shall superintend or perform all duties respecting the granting and issuing of patents directed by law; and he shall have charge of all books, records, papers, models, machines, and other things belonging to the Patent Office."

§ 483, as amended[2] (35 USC § 6)[3] very extensively and very seriously limits and curtails the rule-making power exercisable under RS § 483 and the "supervision" of the Patent Office by the Secretary of Commerce;[4] wholly disregards the effect of the provision of RS § 481 that the authority conferred upon the Commissioner by that section is to be exercised "under the direction of the Secretary of Commerce"; disregards the fact that the Secretary of Commerce gives direction under RS § 481 by regulations established under RS § 483 by the Commissioner of Patents with "the approval of the Secretary of Commerce"; disregards the fact that RS § 481 may not be construed without reference to the words "under the direction of the Secretary of Commerce" embodied in that section or without regard to RS § 483 and the regulations established thereunder by the Commissioner of Patents subject to "the approval of the Secretary of Commerce." Respondent's brief does not deny that the decision of the Court below nullifies many of the present regulations made pursuant to RS § 483 with the

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[2] "Section 483. The Commissioner of Patents, subject to the approval of the Secretary of Commerce, may from time to time establish regulations, not inconsistent with law, for the conduct of proceedings in the Patent Office."

[3] 35 USC "§ 6. Duties of commissioner. The Commissioner of Patents, under the direction of the Secretary of Commerce, shall superintend or perform all duties respecting the granting and issuing of patents directed by law; and he shall have charge of all books, records, papers, models, machines, and other things belonging to the Patent Office. He may, subject to the approval of the Secretary of Commerce, from time to time establish regulations, not inconsistent with law, for the conduct of proceedings in the Patent Office. R. S. §§ 481, 483; Feb. 14, 1903, c. 552, § 12, 32 Stat. 830."

[4] Executive order of March 17, 1925 published in Official Gazette of March 31, 1925, Vol. 332, p. 957, which transferred the Patent Office and its "supervision" from the Department of the Interior (RS § 441; 5 USC § 485) to the Department of Commerce.

approval of the Secretary of Commerce. It does not deny that the decision of the Court below confers upon the Commissioner jurisdiction, power and authority to perform, under the guise of supervisory authority, acts of a judicial or quasi-judicial character, jurisdiction to perform which has been expressly confided by Rule or Statute to other Patent Office tribunals.

In its brief, Respondent does not deny that the questions decided by the Court below have not been, but should be, settled by this Court.

On the contrary, Respondent in its brief attempts to dwarf the importance of the questions decided by the Court of Appeals and to belittle and minimize the effect of the order of the Commissioner dated July 19, 1946 by repeatedly contending that the only effect of that order is to fix "the order of taking testimony" in the interference.

But the challenged order (R. 34) of the Commissioner is a complete refutation of the contention of Respondent that the only effect of that order is to fix "the order of taking testimony" in the interference. The challenged order of the Commissioner reveals that its reach extends far beyond the limits suggested by Respondent. It gives evidential value, as against Petitioner, to a judgment of the District Court for the District of Columbia to which neither Petitioner nor its assignor was a party or privy. That challenged order holds that the Patent Office "will accept the Court's decision as correct, unless it is shown [by Petitioner] not to be so." It thus imposes the will of the Commissioner upon the Board of Interference Examiners contrary to the provisions of the Acts of the Congress of March 2, 1927 and August 5, 1939. It imposes upon Petitioner the burden of proving the negatives that the joinder as inventors of Hunt and Olson in their joint application was *not* a mistake, that that application was *not* filed in good faith, and that reasonable diligence was *not* exercised to correct any mistake, if such there was, in filing that joint appli-

cation—all of which are matters peculiarly within the knowledge of Hunt and Olson.

That challenged order deprives Petitioner of the benefit of the presumption of priority of invention to which he is entitled under the very terms of Patent Office Rule 116.[5]

Instead of challenging the soundness and substantial character of the "Reasons Relied on for Allowance of the Writ," which Petitioner understands are the only matters now for consideration (Rule 38, 4 (c)), Respondent's brief seems to be devoted mainly, if not entirely, to an attempt to persuade this Court that the decision of the Court of Appeals is correct and, for that reason, that there is no warrant for issuing the Writ. The decision of the Court below is founded on the novel doctrine that the Patent Office Rules are not binding upon the Commissioner because the duty of superintendence conferred upon him by R. S. § 481 is supreme, and therefore relieves the Commissioner from the binding effect of those rules. The decision of the Court below is in effect that if the Commissioner asserts that any act of his is done under "the supervisory authority of the Commissioner," the Rules of the Patent Office established under R. S. § 483 with the approval of the Secretary of Commerce, though purporting to pertain to and govern such act, are without relevance or significance, even in the absence of any showing that the Secretary of Commerce has

[5] "116. The parties to an interference will be presumed to have made their inventions in the chronological order in which they filed their completed applications for patents clearly disclosing the same; and the burden of proof will rest upon the party who shall seek to establish a different state of facts.

The termination of the interference by dissolution under rule 122 without an award of priority shall not disturb this presumption, and a party enjoying the status of a senior party with respect to any subject-matter of his application shall not be deprived of any claim to such subject-matter solely on the ground that such claim was not added to the interference by amendment under rule 109."

given to the Commissioner any direction (R. S. § 481), save by the rules, with respect to the challenged act of the Commissioner. That decision by the Court of Appeals seems clearly to overlook or disregard the express limitation of R. S. § 481; the interrelation of R. S. § 481, R. S. § 483 and the regulations established thereunder, and the conflicting declaration of this Court in *Ewing v. Fowler Car Co.*, 244 U. S. 1, 3-4, that

> "regulations known as 'Rules of Practice in the United States Patent Office' * * * have the force and effect of law binding as well upon the Commissioner as upon the applicant for patents."

By the decision of the Court of Appeals, power, unrestrained save by his will, would seem to be conferred upon the Commissioner with respect to all patent office matters. Such a consequence is a matter of the utmost importance to all members of the public having business with the patent office. Indeed, that decision would seem to violate the fundamental principle that compliance by government officials with departmental rules is essential to due process of law guaranteed by the Constitution of the United States (R. 25).

The fundamental and basic character of the questions presented to this Court is clearly revealed by the antithetically divergent views of the two Courts below (R. 22-25 and R. 119-121) with respect to the jurisdiction and powers of the Commissioner of Patents, the rights of the public under the statutes here involved and the regulations established under RS § 483 with the approval of the Secretary of Commerce. Until those basic questions are decided by this Court, the orderly conduct of procedure in the Patent Office in conformity with regulations established pursuant to RS § 483 will undoubtedly be supplanted by other decisions of the Commissioner inconsistent with the statutes and Rules of the Patent Office hitherto deemed to be binding upon it; and the rights of the public having business relations with

the Patent Office will undoubtedly be governed not by established procedure as contemplated by RS § 483 but will depend and turn upon the unrestrained will of the Commissioner.

* * *

In the conclusion to his brief (pp. 15-16) Respondent says:

> "* * * there is no conflict with any applicable decision of this Court. * * *"

Petitioner submits that in that statement Respondent is wholly in error. Petitioner submits that *Ewing v. Fowler Car Co.*, 244 U. S. 1, 3-4, and *Butterworth v. Hoe*, 112 U. S. 50, are both here most pertinent, applicable, and in conflict with the decision of the Court below. The former of those cases holds that the Rules of Practice in the United States Patent Office have the force and effect of law binding as well upon the Commissioner as upon the applicant for patents.

Indeed, Respondent concedes (his Br. p. 11) that

> "* * * the Rules of Practice are binding upon the Commissioner (see Ewing v. Fowler Car Co., 244 U. S. 1, 3-4), * * *"

But Respondent contends (his Br. p. 11) and the Court below held (R. 121) that

> "The Patent Office Rules not only do not, but could not, limit the Commissioner's supervisory authority."

In so contending and holding, Respondent and the Court below wholly overlook, or disregard, the requirement of RS § 481 that the powers and jurisdiction conferred upon the Commissioner by that statute are to be exercised "under the direction of the Secretary of Commerce," and that such direction is put into effect in and by the regulations established under RS § 483 with "the approval of the Secretary of Commerce." In view of those two sections of the

statutes, the Patent Office Rules are limitations of the Commissioner's powers under RS § 481 and deny to the Commissioner jurisdiction, power, or authority to perform any act in contravention thereof. By overlooking or disregarding that fact, the Court below has extended the jurisdiction of the Commissioner far beyond that authorized by RS § 481 when construed in the light of RS § 483.

Petitioner further submits that the decision of the Court below is in conflict with the principle of the decision of this Court in *Butterworth v. Hoe*, 112 U. S. 50. Respondent here takes the position (his Br. p. 10) that the Commissioner's

> "• • • duty of supervision extends to *all*[6] activities of lower Patent Office tribunals respecting the granting and issuing of patents and extends to rulings made by these tribunals in interference proceedings. • • •"

In the *Hoe* case, the Secretary of the Interior claimed that his powers of supervision and direction extended

> "to all the official acts of the Commissioner, without regard to any distinction between those which are merely ministerial and those which are judicial in their nature; and that such supervision and direction may be exerted at any stage of a proceeding, in the discretion of the Secretary, whether in advance, or during its progress, or after its termination, and embraces, therefore, the mode of appeal, though no appeal, in express terms, is actually given." (112 U. S. 55)

This Court there denied the soundness of that contention for reasons that seem equally applicable in the case at bar.

Respondent's contention that the *Hoe* case is here inapplicable is made to rest in whole or in part (his Br. footnote 4, p. 14) upon the ground that

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[6] Emphasis is Petitioner's.

> "• • • the statute there involved merely stated that the Commissioner was to act under the direction of the Secretary; • • •."

Again, Petitioner must submit that Respondent is wholly in error. RS § 441 was among the statutes there involved and relied upon by the Secretary of the Interior. It provided:

> "The Secretary of the Interior is charged with the supervision of public business relating to the following subjects; • • • FIFTH: Patents For Inventions. • • •"

It was under that statute—manifestly less restricted than RS § 481 which subjects the Commissioner to the direction of the Secretary of Commerce—as well as under RS §§ 481 and 483, that the Secretary of the Interior made his aforesaid claim in the *Hoe* case.

Petitioner submits that the "Reasons Relied on for Allowance of the Writ" stand wholly unrefuted by the Brief of Respondent; that the Court below decided questions of substance relating to the construction of Federal Statutes gravely affecting the public in the patent field without giving effect to the decisions of this Court in *Butterworth v. Hoe*, 112 U. S. 50 and *Ewing v. Fowler Car Co.*, 244 U. S. 1, 3-4.

CONCLUSION.

WHEREFORE, Petitioner earnestly prays that the petition for writ of certiorari be granted, the cause reviewed and the decree of the United States Court of Appeals for the District of Columbia be reversed.

Respectfully submitted,

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Dated: August 17, 1948.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and Patent Office rules involved	2
Statement	3
Argument	8
Conclusion	15
Appendix	17

CITATIONS

Cases:

Bendix Aviation Corp. v. *Coe*, Civil Action No. 20,073, District Court for the District of Columbia	4, 9
Butterworth v. *United States ex rel. Hoe*, 112 U. S. 50	14
Cady, Ex parte, 1916 C. D. 57	12
Drawbaugh, In re, 9 App. D. C. 219	10
Ewing v. *Fowler Car Co.*, 224 U. S. 1	11
Goss v. *Scott*, 1901 C. D. 548	12
Hackett, Ex parte, 1921 C. D. 63	12
Knudsen, Ex parte, 1895 C. D. 29	12
Matilet, Ex parte, 1926 C. D. 62	12
Moore v. *United States ex rel. Chott*, 40 App. D. C. 591, writ of error dismissed, 237 U. S. 197	12
Moore v. *United States ex rel. Lindmark*, 33 App. D. C. 597	15
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41	15
Pledger, Ex parte, 1910 C. D. 124	12
Podlesak v. *McInnerney*, 26 App. D. C. 399	10, 12
Raulet v. *Adams*, 1905 C. D. 55	12
Sobey v. *Holsclaw*, 28 App. D. C. 65, certiorari denied, 203 U. S. 594	12
Svenson v. *Coe*, 101 F. 2d 684	10
United States ex rel. American Gas-Accumulator Co. v. *Coe*, 84 F. 2d 398	10, 15
United States ex rel. Dwiggins v. *Ewing*, 43 App. D. C. 204, certiorari denied, 238 U. S. 640	10, 12, 15
United States ex rel. Searl, v. *Robertson*, 18 F. 2d 829, certiorari denied, 275 U. S. 532	10, 15
Wigton v. *Coe*, 68 F. 2d 414, certiorari denied, 291 U. S. 677	10, 12

Statutes:	Page
Act of March 2, 1927 (44 Stat. 1335)	2, 8, 13
Sec. 3	18
Sec. 4	18
Sec. 6	18
Sec. 8	18
Act of August 5, 1939 (53 Stat. 1212)	2, 8, 13
Sec. 1	19
Sec. 3	20
R. S. 481, 35 U. S. C. 6	2, 10, 17
R. S. 483, 35 U. S. C. 6	2, 11, 17
R. S. 4904	13, 17
R. S. 4910	13
R. S. 4915	4
Miscellaneous:	
McCrady, *Patent Office Practice* (2d Ed. 1946), pp. 249, 250	12, 13
Patent Office Rules of Practice	2
Rule 97	3, 20
Rule 116	3, 21
Rule 118	3, 21
Rule 122	9, 21
Rule 124	8, 11, 22

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 123

CARTER CARBURETOR CORPORATION, PETITIONER

v.

LAWRENCE C. KINGSLAND, COMMISSIONER OF PATENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The informal memorandum opinion of the District Court of the United States for the District of Columbia appears at pp. 15–16 of the Record. The findings of fact and conclusions of law of that court (R. 17–25) are reported at 73 U. S. P. Q. 278. The opinion of the United States Court of Appeals for the District of Columbia (R. 120–121) is reported at 77 U. S. P. Q. 499.

JURISDICTION

The judgment of the Court of Appeals was entered on May 25, 1948 (R. 121–122). The peti-

tion for a writ of certiorari was filed on June 25, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In an interference proceeding pending before him, the Examiner of Interferences deferred setting for hearing before the Primary Examiner the junior party's motion to shift the burden of proof until final hearing. The Commissioner of Patents, on the junior party's petition, ordered that a district court ruling be accepted as *prima facie* correct and that the junior party should be declared the senior party solely for the purpose of determining the order of taking testimony. The question presented is whether the Patent Office Rules of Practice, particularly Rule 124 barring appeals from decisions on motions to shift the burden of proof in interference proceedings, or the Acts of March 2, 1927 and August 5, 1939 eliminating appeals to the Commissioner in determinations of priority of invention, deprive the Commissioner of Patents of power so to act.

STATUTES AND PATENT OFFICE RULES INVOLVED

The pertinent provisions of 35 U. S. C. § 6, 52 (Rev. Stat. 481, 483, 4904); of the Act of March 2, 1927 (44 Stat. 1335); of the Act of August 5, 1939 (53 Stat. 1212) and of the Patent Office

Rules of Practice are set forth in the Appendix, *infra*, pp. 17–22.

STATEMENT

Petitioner, Carter Carburetor Corporation, owns, by assignment, the entire right, title and interest in Coffey Patent No. 2,085,351 relating to the alleged invention of a carburetor (R. 2). This patent was issued on June 29, 1937, on the Coffey application No. 679,201, filed in the Patent Office on July 6, 1933 (R. 2). On January 14, 1946, an interference (Interference No. 82,262) was declared between this patent and the pending Hunt application No. 727,648 which was filed on May 26, 1934, and which also disclosed an alleged invention for carburetors (R. 2). As required by Patent Office Rule 97, Appendix, *infra*, p. 20, the Primary Examiner forwarded to the Examiner of Interferences a statement, in which he disclosed the applications involved in the interference, arranged in inverse chronological order of the filing of the completed applications on the basis of the above dates (R. 27). As so arranged, Hunt was the junior party in the interference and consequently was required by Patent Office Rules 116 and 118 Appendix, *infra*, p. 21 to bear the burden of proof and to take his testimony first (R. 3).

On April 8, 1946, Hunt moved the Examiner of Interferences to shift the burden of proof on the ground that he was entitled to the earlier

filing date of November 14, 1931, of application No. 575,025 which he had filed jointly with Olson (R. 28). In his motion, Hunt referred to the ruling of the United States District Court for the District of Columbia in *Bendix Aviation Corp.* v. *Coe*, Civil Action No. 20,073 brought under Rev. Stat. 4915, where the court had held that the Hunt-Olson joint application had completely disclosed the subject matter of the claims involved in the Hunt-Coffey interference and that Hunt was entitled to the filing date of that application. The Examiner of Interferences dismissed Hunt's motion "without prejudice to the right of Hunt to urge at final hearing that he be given the benefit of the earlier application" (R. 28, 29, 30). In so dismissing the motion, he pointed out that the Primary Examiner had already rejected a similar motion of Hunt in the earlier interference of which the present interference was a continuation and considered that it would merely be time-consuming to set the motion for hearing, only to have it vacated if the Primary Examiner adhered to his previous position (R. 29).

Hunt then filed "Petition to the Commissioner" calling his attention to the district court ruling and praying him to "review and reverse the ruling of the Examiner of Interferences dismissing [his] motion to shift the burden of proof" (R. 31). The Assistant Commissioner on July 19, 1946, granted Hunt's petition "to the

extent indicated" (R. 35). In his decision the Assistant Commissioner recognized that Coffey was not a party to the district court action, and that that decision was not *res judicata* as to him. But, he continued, "in accordance with the settled practice, the Patent Office will accept the Court's decision as correct, unless it is shown not to be so. *Prima facie,* therefore, Hunt is entitled, in this proceeding, to the benefit of the filing date of the joint application, and the primary examiner should have accorded him the benefit of this date in setting up the interference. Hunt, therefore, should be made the senior party, without consideration of his motion to shift the burden of proof."

"As already noted, Coffey is entitled to attack the holding that Hunt is entitled to the date of the joint application. However, * * * this question should not be further considered at the interlocutory stage, but should be disposed of at final hearing" (R. 35).

The Assistant Commissioner, in subsequently denying Coffey's petition of August 1, 1946, to vacate this order, stated that "Hunt's petition was not considered as an appeal but as a petition to the supervisory authority of the Commissioner, and the action taken on the petition was based on such authority" (R. 76). He further indicated that since the district court had held that the Hunt-Olson application completely disclosed the subject matter of interference, Hunt was entitled

prima facie to the benefit of the filing date thereof (R. 76). "This date is prior to the filing of any application by Coffey disclosing the invention here in issue. Rule 116 therefore requires that Hunt be made the senior party" (R. 77). In accordance with this order, the Examiner of Interferences realigned the parties (R. 21).

Coffey on August 26, 1946, filed a motion before the Examiner of Interferences to shift the burden of proof to Hunt (R. 78–83). The Examiner of Interferences on August 30, 1946, noted this motion, and in accordance with the Commissioner's decision of July 19, 1946, deferred consideration thereof to final hearing (R. 84). Coffey on August 29, 1946, again petitioned the Commissioner to vacate his order of July 19, 1946 (R. 85–92), which petition was denied (R. 93).

Petitioner, thereupon filed a complaint "for judgment in nature of judgment for mandamus" against the Commissioner of Patents in the United States District Court for the District of Columbia. (R. 1–11). The complaint challenged the Commissioner's authority to make the order of July 19, 1946, and demanded judgment so stating. It further prayed for an order commanding the Commissioner to vacate and set aside that order and to direct the Examiner of Interferences to disregard it (R. 10). The district court, granting the judgment prayed (R. 25–26), held that the Commissioner's order "had the practical effect of shifting the burden of proof, authority for which

is denied in the applicable law and by rule of the Patent Office. The petition to shift the burden of proof was not addressed to the Commissioner in view of his supervisory authority, and the action taken thereon may not be upheld on such hypothesis" (R. 16).

On appeal, the court below reversed (R. 121–122). Pointing out that the question before it was not whether the Assistant Commissioner's action was right but whether he had authority to act at all, the court held (R. 120–121):

> * * * neither the primary examiner nor the Assistant Commissioner rendered a decision on Hunt's motion to shift the burden of proof. Moreover, even if both had rendered decisions on that motion each would have been acting within his authority. The absence of a right of appeal to the Commissioner where Rule 124 applies does not mean that he cannot exercise his supervisory authority on request. * * * The difference between the processes is much like that between appeal and certiorari. The Patent Office Rules not only do not but could not limit the Commissioner's supervisory authority. * * * The Commissioner cannot abdicate *. * * [his] statutory duty of superintendence. It is therefore immaterial that he may establish regulations "not inconsistent with law" for the conduct of proceedings in the Patent Office. R. S. § 483 as amended, 35 U. S. C. § 6.

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ARGUMENT

In this case petitioner is seeking by a "judgment in nature of judgment for mandamus" (R. 1), to set aside the order of the Commissioner of Patents[1] whereby the Commissioner in the exercise of his supervisory authority declared that for the purpose of determining the order of taking testimony, Hunt was entitled, because of the district court ruling in the *Bendix* case, *prima facie* to be the senior party in the interference proceeding. Petitioner's position, that the Commissioner's order involved improper supervision over a quasi-judicial function of a subordinate Patent Office tribunal, is predicated on the binding effect of the Patent Office Rules of Practice, particularly Rule 124, Appendix, *infra,* p. 22, barring appeals on motions to shift burden of proof, and on the Act of March 2, 1927, 44 Stat. 1335, *infra,* p. 18, and the Act of August 5, 1939, 53 Stat. 1212, *infra,* pp. 19–20, dealing with the determination of priority of invention. The decision below rejecting these contentions is, we submit, clearly correct, and hence further review by this Court is not warranted.

1. Contrary to petitioner's assumption, the Examiner of Interferences did not pass on the merits of Hunt's motion to shift the burden of proof, and the Commissioner's order of July 19, 1946,

[1] Although the order under attack was issued by the Assistant Commissioner, petitioner does not question that the Assistant Commissioner was properly performing the Commissioner's duties.

did not purport to reverse any quasi-judicial ruling of a Patent Office tribunal. As is clear from the record, the Examiner of Interferences merely declined to set Hunt's motion for hearing on the merits before the Primary Examiner, who is charged with the determination of such matters (see Patent Office Rule 122, Appendix, *infra*, pp. 21–22), and reserved the right to Hunt to raise the question again at final hearing (R. 29). And the Commissioner in his order of July 19, recognized the limited nature of the Examiner of Interferences' action. The Commissioner's order specifically indicates that it was made "without consideration of his [Hunt's] motion to shift the burden of proof," and expressly deferred decision until final hearing on the question as to the weight to be awarded the district court ruling in the *Bendix* case on the fixing of the burden of proof (R. 35). Thus, no action was taken by the Commissioner on the merits of the question as to which of the parties should bear the burden of proof in light of the district court's ruling in the *Bendix* case, a question which petitioner asserts is not subject to the Commissioner's supervision because quasi-judicial. The only matter finally determined by the Commissioner's order was that in accordance with Patent Office settled practice the ruling in the *Bendix* case should *prima facie* be accepted "as correct, unless it is shown not to be so." (R. 35). As so limited, the sole effect of the Commissioner's order is that Hunt is the senior party

to the interference for purpose of determining the order of taking testimony, a matter which is clearly non-judicial in nature.[2]

2 (a). Rev. Stat. 481, 35 U. S. C. 6, Appendix, *infra* p. 17, clearly and explicitly clothes the Commissioner of Patents with authority, and imposes upon him a mandate, to "superintend * * * *all* duties respecting the granting and issuing of patents." (Emphasis supplied). And it has long been recognized that this duty of supervision extends to all activities of lower Patent Office tribunals respecting the granting and issuing of patents and extends to rulings made by these tribunals in interference proceedings. *Wigton* v. *Coe,* 68 F. 2d 414 (App. D. C.), certiorari denied, 291 U. S. 677; *Svenson* v. *Coe,* 101 F. 2d 684, 685 (App. D. C.); *United States ex rel. American Gas-Accumulator Co.* v. *Coe,* 84 F. 2d 398 (App. D. C.); *United States ex rel. Searl* v. *Robertson,* 18 F. 2d 829 (App. D. C.), certiorari denied, 275 U. S. 532; *United States ex rel. Dwiggins* v. *Ewing,* 43 App. D. C. 204, certiorari denied, 238 U. S. 640; *Podlesak* v. *McInnerney,* 26 App. D. C. 399, 404; *In re Drawbaugh,* 9 App. D. C. 219, 240.

(b). The over-all supervisory authority vested in the Commissioner by Rev. Stat. 481, has not

[2] Since each of the parties in their preliminary statements alleged dates of invention prior to the filing date of the Hunt-Olson application, the *prima facie* seniority accorded to Hunt by the Commissioner will not have any affect ultimately on the determination of priority of invention.

been curtailed in the situation here involved, as petitioner suggests (Pet. 9, 10, 14–18), by the Patent Office Rules of Practice, particularly Rule 124, promulgated by the Commissioner. Although the Rules of Practice are binding upon the Commissioner (see *Ewing* v. *Fowler Car Co.*, 244 U. S. 1, 3–4), these Rules are promulgated pursuant to his power to establish, for the conduct of proceedings in the Patent Office, regulations "not inconsistent with law." Rev. Stat. 483, 35 U. S. C. 6, Appendix, *infra* p. 17. And it is obvious that any rule by which the Commissioner undertook expressly to remove any duty respecting the granting and issuing of patents entirely from under his supervision would be inconsistent with law. As pointed out below (R. 121), "the Commissioner cannot" by the promulgation of Rules of Practice "abdicate * * * [his] statutory duty of superintendence."[3]

The view that the Commissioner retained supervisory authority over his subordinates' activities without regard to the nature of these activities or whether an appeal to him therefrom would lie under the Rules of Practice has been consistently adhered to by the Patent Office and approved by the courts. This view is based on the recognized

[3] Were the Commissioner precluded from supervising the work of the patent and trademark examiners and the examiners of interferences the greater part of which is quasi-judicial in nature, the Commissioner would have supervision over only a relatively minor part of the activities of the Patent Office.

fact that the Commissioner's duties respecting the granting and issuing of patents are dual in nature; he acts as a supervisor over his subordinates' activities, and he sits as an appellate tribunal in matters in regard to which the Rules of Practice or pertinent statute provide for an appeal to him as of right. See McCrady, *Patent Office Practice* (2d Ed. 1946) p. 249. As stated below, "the difference between the two processes is much like that between appeal and certiorari" (R. 121). Hence, it has long been accepted that the Commissioner acting in his supervisory capacity may, notwithstanding the absence of a right to appeal, correct, on his own initiative or on the petition of the party affected, a clear error of a lower Patent Office tribunal, committed while ruling on a quasi-judicial matter assigned to it by rule or statute. See, *e. g., Sobey* v. *Holsclaw,* 28 App. D. C. 65, certiorari denied, 203 U. S. 594; *Wigton* v. *Coe,* 68 F. 2d 414 (App. D. C.), certiorari denied, 291 U. S. 677; *United States ex rel. Dwiggins* v. *Ewing,* 43 App. D. C. 204, certiorari denied, 238 U. S. 640; *Podlesak* v. *McInnerney,* 26 App. D. C. 399; *Moore* v. *United States ex rel. Chott,* 40 App. D. C. 591, writ of error dismissed, 237 U. S. 197; *Goss* v. *Scott,* 1901 C. D. 548; *Ex parte Knudsen,* 1895 C. D. 29; *Ex parte Pledger,* 1910 C. D. 124; *Raulet* v. *Adams,* 1905 C. D. 55; *Ex parte Cady,* 1916 C. D. 57; *Ex parte Hackett,* 1921 C. D. 63; *Ex parte Mattlet,* 1926 C. D. 62; cf.

McCrady, *Patent Office Practice* (2d Ed. 1946), p. 250.

(c) Nor does the Act of March 2, 1927, *infra*, pp. 18–19, or the Act of August 5, 1939, *infra*, pp. 19–20, deprive the Commissioner of supervisory authority over his subordinate's determinations as to priority of invention, which petitioner claims was involved in the Commissioner's order. Both these Acts were concerned with the Commissioner only as an appellate tribunal, and did not restrict his supervisory authority. Prior to the Act of March 2, 1927, an applicant could take an appeal to the Commissioner from the decision of the board of examiners in chief reviewing the earlier decision of a Primary Examiner as to priority of invention. The Act of March 2, 1927, repealed Rev. Stat. 4910 and amended Rev. Stat. 4904 so as to eliminate appeals as of right to the Commissioner. Instead, it created a board of appeals of which the Commissioner is a member and provided that that board was to be the appellate tribunal within the Patent Office for the review and determination of questions as to priority of invention. See Appendix, *infra*, p. 18. The Act of August 5, 1939, did away with appeals within the Patent Office and established a board of three examiners of interference to determine the question of priority of invention. The Act further provided "and the Commissioner may issue a patent to the party who is adjudged the prior inventor." Appendix, *infra*, p. 20. Thus, as far as the Commissioner's duties are concerned, both

Acts together merely eliminate a right of appeal to him without affecting his supervisory authority over his subordinates' activities, including those activities dealt with in these Acts. See cases cited, *supra*, pp. 12–13.[4]

3. There are additional reasons supporting the decision below. The question as to who is to bear the burden of proof becomes important only when the evidence is evenly balanced. If, as is usually the situation when all the evidence is in, there is a preponderance favoring one party as against the other, all questions as to burden of proof cease to have any practical significance. The possibility of an ultimate outcome favorable to petitioner renders premature his complaint that he has been injured by the Commissioner's order, particularly in view of the fact that the only effect of that order is to require him to take testimony first.

[4] *Butterworth* v. *United States ex rel. Hoe*, 112 U. S. 50, relied on by petitioner (Pet. 10–11, 18–20) is clearly distinguishable and does not govern the present case. The *Hoe* case related to the right of the Secretary of Interior to review a decision of the Commissioner of Patents and the statute there involved merely stated that the Commissioner was to act under the direction of the Secretary; it did not charge the latter with superintending all duties of the Commissioner. Further, this Court in the *Hoe* case relied heavily on the fact that the statute there involved provided for judicial review of the Commissioner's action. The statutes involved here make no such provision for judicial review of decisions of the primary examiner or of the examiner of interferences on such interlocutory or formal matters in interferences, as determining which party is to take testimony first, or for that matter, fixing the burden of proof.

If Coffey is in fact the first inventor, he must be able to prove it independently of the testimony introduced by Hunt. For this reason, the mere requirement of the Commissioner that Coffey take testimony first does not cause him such irreparable injury as will sustain the relief sought. Cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51.

Moreover, when the question as to burden of proof is determined at final hearing, it will be reviewable by the courts in the manner regularly provided, that is, by appeal from an award of priority or by action under Rev. Stat. 4915. Accordingly, judicial intervention by way of mandatory injunction at this interlocutory state of Patent Office proceedings is unwarranted. Cf. *United States ex rel. American Gas-Accumulator Co.* v. *Coe,* 84 F. 2d 398 (App. D. C.); *United States ex rel. Searl* v. *Robertson,* 18 F. 2d 829 (App. D. C.), certiorari denied, 275 U. S. 532; *United States ex rel. Dwiggins* v. *Ewing,* 43 App. D. C. 204, certiorari denied, 238 U. S. 640; *Moore* v. *United States ex rel. Lindmark,* 33 App. D. C. 597.

CONCLUSION

The decision below is clearly correct, and there is no conflict with any applicable decision of this

Court. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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JULY 1948.

APPENDIX

1. 35 U. S. C. 6 (Rev. Stat. 481, 483) provides as follows:

> The Commissioner of Patents, under the direction of the Secretary of Commerce, shall superintend or perform all duties respecting the granting and issuing of patents directed by law; and he shall have charge of all books, records, papers, models, machines, and other things belonging to the Patent Office. He may, subject to the approval of the Secretary of Commerce, from time to time establish regulations, not inconsistent with law, for the conduct of proceedings in the Patent Office.

2. Rev. Stat. 4904 provides as follows:

> Whenever an application is made for a patent which, in the opinion of the Commissioner, would interfere with any pending application, or with any unexpired patent, he shall give notice thereof to the applicants, or applicant and patentee, as the case may be, and shall direct the primary examiner to proceed to determine the question of priority of invention. And the Commissioner may issue a patent to the party who is adjudged the prior inventor, unless the adverse party appeals from the decision of the primary examiner, or of the board of examiners-in-chief, as the case may be, within such time, not less than twenty days, as the Commissioner shall prescribe.

3. Act of March 2, 1927 (44 Stat. 1335) in pertinent part provides as follows:

> SEC. 3. That section 482 of the Revised Statutes of the United States be amended to read as follows:
>
> "SEC. 482. The examiners in chief shall be persons of competent legal knowledge and scientific ability. The Commissioner of Patents, the first assistant commissioner, the assistant commissioner, and the examiners in chief shall constitute a board of appeals, whose duty it shall be, on written petition of the appellant, to review and determine upon the validity of the adverse decisions of examiners upon applications for patents and for reissues of patents and in interference cases. Each appeal shall be heard by at least three members of the board of appeals, the members hearing such appeal to be designated by the commissioner. The board of appeals shall have sole power to grant rehearings."
>
> SEC. 4. That section 4904 of the Revised Statutes of the United States be amended by striking out from the last sentence thereof the words "or of the board of examiners in chief, as the case may be."
>
> * * * * *
>
> SEC. 6. That section 4910 of the Revised Statutes of the United States be, and the same is hereby, repealed.
>
> * * * * *
>
> SEC. 8. That section 4911 of the Revised Statutes of the United States be amended to read as follows:
>
> "SEC. 4911. If any applicant is dissatisfied with the decision of the board of appeals, he may appeal to the Court of Appeals of the District of Columbia, in which case he waives his right to proceed under

section 4915 of the Revised Statutes. If any party to an interference is dissatisfied with the decision of the board of appeals, he may appeal to the Court of Appeals of the District of Columbia, provided that such appeal shall be dismissed if any adverse party to such interference shall, within twenty days after the appellant shall have filed notice of appeal according to section 4912 of the Revised Statutes, file notice with the Commissioner of Patents that he elects to have all further proceedings conducted as provided in section 4915 of the Revised Statutes. Thereupon the appellant shall have thirty days thereafter within which to file a bill in equity under said section 4915, in default of which the decisions appealed from shall govern the further proceedings in the case. If the appellant shall file such bill within said thirty days and shall file due proof thereof with the Commissioner of Patents, the issue of a patent to the party awarded priority by said board of appeals shall be withheld pending the final determination of said proceeding under said section 4915."

4. Act of August 5, 1939 (53 Stat. 1212) in pertinent part provides as follows:

SEC. 1. That section 4904 of the Revised Statutes (U. S. C., title 35, sec. 52) be amended to read as follows:

"Whenever an application is made for a patent which, in the opinion of the Commissioner, would interfere with any pending application, or with any unexpired patent, he shall give notice thereof to the applicants, or applicant and patentee, as the case may be, and shall direct a board of three examiners of interferences to proceed to determine the question of priority

of invention. And the Commissioner may issue a patent to the party who is adjudged the prior inventor."

* * * * *

SEC. 3. That section 4911 of the Revised Statutes (U. S. C., title 35, sec. 59a) be amended by changing the words "Board of Appeals" in the second sentence to read "board of interference examiners", and by canceling the last sentence of said section.

5. The Patent Office Rules of Practice read as follows:

97. When an interference is found to exist and the applications are prepared therefor, the primary examiner shall forward to the interference division the files and drawings; notices of interference for all the parties (as specified in rule 103) disclosing the name and residence of each party and those of his attorney or agent, and of any assignee, and, if any party be a patentee, the date and number of the patent; the ordinals of the conflicting claims and the title of the invention claimed; and the issue, which shall be clearly and concisely defined in so many counts or branches as may be necessary in order to include all interfering claims. Where the issue is stated in more than one count the respective claims involved in each count shall be specified. The primary examiner shall also forward a statement disclosing the applications involved in interference, fully identified, arranged in the inverse chronological order of the filing of the completed applications, and also disclosing the issue or issues and the ordinals of the conflicting claims, the name and residence of any assignee, and the names and

residences of all attorneys or agents, both principal and associate.

* * * * *

116. The parties to an interference will be presumed to have made their inventions in the chronological order in which they filed their completed applications for patents clearly disclosing same; and the burden of proof will rest upon the party who shall seek to establish a different state of facts.

The termination of the interference by dissolution under rule 122 without an award of priority shall not disturb this presumption, and a party enjoying the status of a senior party with respect to any subject-matter of his application shall not be deprived of any claim to such subject-matter solely on the ground that such claim was not added to the interference by amendment under Rule 109.

* * * * *

118. Times will be assigned in which the junior applicant shall complete his testimony in chief, and in which the other party shall complete the testimony on his side, and a further time in which the junior applicant may take rebutting testimony; but he shall take no other testimony. If there be more than two parties to the interference, the times for taking testimony will be so arranged that each shall have an opportunity to prove his case against prior applicants and to rebut their evidence, and also to meet the evidence of junior applicants.

* * * * *

122. Motions to dissolve an interference (1) alleging that there has been such informality in declaring the same as will pre-

clude the proper determination of the question of priority of invention, or (2) denying the patentability of an applicant's claim, or (3) denying his right to make the claim, or (4) if the interference involves a design patent or an application, alleging that there is no interference in fact and also motions to shift the burden of proof, should contain a full statement of the grounds relied upon and should, if possible, be made within the time fixed by the examiner of interferences, not less than thirty days, after the statements of the parties have been received and approved. Such motions and all motions of a similar character, if in the opinion of the examiner of interferences they be in proper form, will be heard and determined by the primary examiner, due notice of the day of hearing being given by the office to all parties. If in the opinion of the examiner of interferences the motion be not in proper form, or if it be not brought within the time specified and no satisfactory reason be given for the delay, it will not be considered and the parties will be so notified.

At the hearing on a motion to dissolve an interference between an application and a patent, the prior art of record in the patent file shall be referred to for the purpose of construing the issue. The matter raised on a motion to shift the burden of proof may be reviewed at final hearing.

124. No appeal will be permitted from a decision rendered on a motion brought under the provisions of rules 109 and 122.

Appeals may be taken directly to the Commissioner from decisions on such other motions as, in his judgment, should be appealable.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

No. 123.

October Term, 1948.

CARTER CARBURETOR CORPORATION,
Petitioner,

v.

LAWRENCE C. KINGSLAND, Commissioner of Patents,
Respondent.

PETITION FOR REHEARING OF THE PETITION OF CARTER CARBURETOR CORPORATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

HUGH M. MORRIS,
GILBERT P. RITTER,
Attorneys for Petitioner.

GEORGE R. ERICSON,
Of Counsel.

International, 236 Chestnut St., Phila. 6, Pa.

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Carter Carburetor Corporation, prays for a rehearing of its petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia, which was denied by an order of this Court made on October 11, 1948. Said petition sought a review of the judgment of that Court entered May 25, 1948 which reversed the judgment of the District Court of the United States for the District of Columbia in Civil Action No. 37782, Carter Carburetor Corporation, Plaintiff, v. Casper W. Ooms, Commissioner of Patents, Defendant, for the latter of whom Lawrence C. Kingsland was later substituted.

As the ground for its petition for rehearing, petitioner states:

On June 29, 1948, four days after the petition for certiorari was filed and before the aforesaid order denying the petition for certiorari was entered, an order of the Commissioner of Patents was published in a Supplement to Official Gazette of the United States Patent Office. That order gave notice that the Patent Office proposed to issue rules and regulations relating to proceedings before it in patent cases and contained a Proposed Revision of Patent Rules. Among such proposed rules is 31.3 which is:

> "31.3 *Suspension of rules.* In an extraordinary situation, when justice requires, any requirement of these rules which is not a requirement of the statutes may be suspended or waived by the Commissioner in person on petition of the interested party, subject to such other requirements as may be imposed."

The proposal of that rule is a circumstance of substantial or controlling effect. It manifests the intention of the Commissioner of Patents to carry forward against all persons having relations with the Patent Office the unlimited and unrestrained power and jurisdiction which the Court of Appeals conferred upon him by giving to R. S. § 481 (35 U. S. C. § 6) dominance not only over the rules of the Patent Office but, as well, over other patent statutes.

In its opinion the Court of Appeals for the District of Columbia said in part (R. 119-121):

> "The absence of a right of appeal to the Commissioner where Rule 124 applies does not mean that he cannot exercise his supervisory authority on request. • • • The difference between the two processes is much like that between appeal and certiorari. The Patent Office Rules not only do not but could not limit the Commissioner's supervisory authority. For R. S. § 481

as amended, 35 U. S. C. § 6, provides that '*The Commissioner of Patents, under the direction of the Secretary of Commerce, shall superintend or perform all duties respecting the granting and issuing of patents* • • •.' The Commissioner cannot abdicate this statutory duty of superintendence. • • •" (Emphasis supplied.)

In arriving at that conclusion, it is believed to be obvious that the Court considered R. S. § 481 not only *in vacuo* but without regard to its legislative history,* to other patent statutes, or to the effect upon the construction of that statute of the words thereof—"under the direction of the Secretary of Commerce" and "directed by law."

As a consequence, it is submitted that if the construction and dominant effect given to R. S. § 481 (35 U. S. C. § 6) by the erroneous decision of the said Court is permitted by this Court to stand and remain as a buttress and support for such practice as is contemplated by the proposed rule, it will give color of legality to a grant of power to the Commissioner which trenches upon the fundamental principles of our system of Government to the detriment and prejudice of the public at large.

Wherefore, your petitioner respectfully prays that a rehearing be granted.

HUGH M. MORRIS,
GILBERT P. RITTER,
Attorneys for Petitioner.

GEORGE R. ERICSON,
Of Counsel.

Dated: October 25, 1948.

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* Patent Act of 1836 (5 Stat. 117 § 1); Consolidated Patent Act of 1870 (16 Stat. 198 § 7); Congressional Globe Vol. 43, Part 4, pp. 2855-2856; Congressional Globe Vol. 43, Part 5, pp. 2679-2680; Congressional Record Vol. 2, Part 1, 43d Congress, First Session, pp. 819-820.

We do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and, also, that the petition is restricted to the grounds specified in Paragraph 2 of Rule 33 of this Court.

HUGH M. MORRIS,
GILBERT P. RITTER,
Attorneys for Petitioner.

Dated: October 25, 1948.

CERTIORARI DENIED